

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY C. SMITH Claimant)	
VS.)	
)	
LEE AEROSPACE, INC.)	
Respondent)	
AND)	
)	
ROYAL & SUNALLIANCE)	
Insurance Carrier)	
)	
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MARY C. SMITH Claimant)	
VS.)	
)	
O'REILLY AUTOMOTIVE, INC.)	
Respondent)	
AND)	
)	
RSKO INSURANCE CO. AND ZURICH NORTH AMERICA)	
Insurance Carriers)	

Docket No. 1,000,636

Docket No. 1,004,709

ORDER

Respondent Lee Aerospace, Inc. and its insurance carrier Royal & SunAlliance Insurance Company requested Appeals Board review of Administrative Law Judge John D. Clark's August 20, 2002, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment and appointed Richard S. Piazza, D.O. as claimant's authorized treating physician. Claimant alleged she injured her left upper extremity and her left shoulder on October 12, 2001, while employed by the respondent Lee Aerospace, Inc. (Lee).

Lee appealed and admits that claimant suffered an initial left upper extremity injury while employed by Lee on October 12, 2001. Lee provided medical treatment for that left upper extremity injury and the injury resolved as of November 12, 2001. Claimant was then laid off from her employment with Lee in the latter part of November 2001. At the same time, the claimant was working for Lee, she also was working part-time for O'Reilly Automobile, Inc. (O'Reilly). Lee argues that claimant's current need for medical treatment for her left upper extremity and left shoulder problems is the result of her work activities while working for O'Reilly and is not the result of the October 12, 2001, accident while employed by Lee.

Respondent O'Reilly and its insurance carriers, RSKo and Zurich North America, first contend that the Appeals Board (Board) is without jurisdiction to review the ALJ's preliminary hearing Order. Second, O'Reilly and its insurance carriers argue that the preliminary hearing Order should be affirmed because the most persuasive evidence contained in the preliminary hearing record proved that claimant's left upper extremity and left shoulder were injured while employed by Lee and not while employed by O'Reilly.

Claimant also requests the Board to affirm the ALJ's preliminary hearing Order. Claimant contends she proved her left upper extremity and left shoulder were injured while she was employed by Lee and not while she was employed by O'Reilly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Board makes the following findings and conclusions:

Claimant injured her left upper extremity on October 12, 2001, as she was pushing a case of aircraft windows along the floor while working for Lee. At that time, claimant felt an acute sharp and burning pain radiating from her left upper extremity through her elbow and down her forearm to her left hand. Claimant notified Lee and was sent on the day of the accident, to Wesley Medical Center Occupational Health Services (Wesley) for examination and treatment.

Claimant saw Robert S. White, D.O. at Wesley. Dr. White diagnosed claimant with left lateral epicondylitis and bicipital tendinitis. On Tuesday, October 16, 2001, claimant was returned to work by Dr. White with the restriction to only use her right upper extremity. Because of those restrictions, Lee took claimant off of work. Claimant then returned to see Dr. White who placed claimant in a physical therapy program and prescribed medications for her left upper extremity injury.

Another physician, Mark S. Dobyns, M.D., also a physician at Wesley, saw claimant on Monday, November 12, 2001. Dr. Dobyns found claimant's left elbow pain had resolved and released claimant to full duty. Dr. Dobyns' November 12, 2001, medical note indicated that Wesley had received a telephone call from Lee denying claimant's workers compensation claim for her left upper extremity injuries.

Claimant returned to work and was then laid off on Friday, November 16, 2001. After claimant returned to work before layoff, she was able to perform her regular job duties for the first two or three days of that week. But on Thursday or Friday of her last week she worked, claimant noticed a reoccurrence of her symptoms in her left upper extremity. By the latter part of Friday, November 16, 2001, her last day worked, she had increased symptoms that involved her shoulder as well.

After claimant was laid off from Lee, she continued to work part-time for O'Reilly and in January 2002 started full-time. On the Monday after layoff, claimant was at home watching television sitting in a awkward position and experienced progressive increasing pain in her left shoulder, arm and numbness involving both her left hand and fingers.

Claimant continues to be able to perform her work at O'Reilly. She is able to utilize her right upper extremity to perform most of her work activities and does not do any heavy work with her left hand. At the preliminary hearing, claimant specifically testified that she did not injure her left upper extremity or left shoulder while working for O'Reilly.¹

On February 12, 2002, claimant's attorney had claimant undergo an independent medical examination by Richard S. Piazza, D.O. At that time, claimant had continuing left upper extremity and left shoulder complaints. Claimant gave Dr. Piazza a history of not having any left upper extremity or left shoulder complaints before her October 12, 2001, accident while working for Lee. After Dr. Piazza conducted a physical examination of claimant, his impressions were internal derangement of the left shoulder rotator cuff mechanism and C4-5 and C5-6 cervical radiculopathy with probable spinal stenosis, bulging disc or herniated disc syndrome.

¹ P.H. Trans. at 17-18.

The doctor recommended claimant undergo a MRI scan of the left shoulder and cervical spine. He also recommended claimant undergo an EMG and nerve conduction study of her left upper extremity. He placed permanent restrictions on her activities. Dr. Piazza opined that claimant's October 12, 2001, accident while employed by Lee was responsible for her current chronic left upper extremity and left shoulder symptoms.

On April 10, 2002, Dr. C. Reiff Brown performed an independent medical examination of claimant. The independent medical examination was at the agreement of the parties.² But Lee's attorney provided Dr. Brown with the claimant's medical treatment records and Dr. Piazza's Independent Medical Evaluation report. Also, in a transmittal letter to Dr. Brown from Lee's attorney, he provided Dr. Brown with a summary of the facts surrounding claimant's injuries.³

Dr. Brown found claimant with constant dull aching pain involving her left shoulder and extending down to her left elbow. After reviewing the medical records and conducting a physical examination of claimant, Dr. Brown opined that claimant suffered a lateral humeral epicondylitis injury and a left symptomatic rotator cuff syndrome as a result of her October 12, 2001, injury while employed by Lee. Based on Dr. White's initial diagnosis of lateral epicondylitis as well as bicipital tendinitis, Dr. Brown concluded that claimant had shoulder symptoms at the time she was initially examined by Dr. White on October 12, 2001. He recommended an EMG of claimant's left upper extremity followed with several injections of the glenohumeral joint and possible arthroscopic procedure with rotator cuff debridement and acromioplasty.

Dr. Brown went on to opine that he attributed claimant's work at O'Reilly as causing some aggravation to claimant's left upper extremity and left shoulder injuries based on the length of time the symptoms had persisted from the original October 12, 2001, accident. He further opined that any permanent functional impairment should be apportioned equally between Lee and O'Reilly. Dr. Brown also placed permanent restrictions on the claimant's activities.

O'Reilly questions the Board's jurisdiction to review this preliminary hearing Order. O'Reilly argues that the only issue is which insurance company has workers compensation coverage. O'Reilly argues the Board does not have jurisdiction to review that issue appealed from a preliminary hearing Order. But the Board disagrees. Here, the issue is whether claimant's left upper extremity and left shoulder injuries arose out of the employment with Lee or did they arise out of the employment with O'Reilly. That issue is

² P.H. Trans. at 6.

³ P.H. Trans., Resp. Ex. 3.

a jurisdictional issue listed in the preliminary hearing statute that gives the Board the jurisdiction to review the issue on appeal from a preliminary hearing.⁴

Claimant first filed an Application for Hearing on November 26, 2001, alleging an October 12, 2001, left upper extremity injury while employed by Lee. That claim was assigned Docket No. 1,000,636. Then on June 25, 2002, claimant filed another Application for Hearing alleging a left upper extremity injury while employed by O'Reilly for a series of accidents from November 12, 2001, and continuing through the present. That claim was assigned Docket No. 1,004,709. Those two docketed claims were consolidated by the ALJ for litigation purposes. The record does not contain any objection from any of the parties on the consolidation. Thus, the Board finds all parties to both docketed claims are subject to the Board's jurisdiction on the question of liability for claimant's injuries.

The Board concludes that claimant's testimony coupled with Dr. Piazza's medical opinions contained in his February 12, 2002, Independent Medical Evaluation are persuasive that claimant's current need for medical treatment for her left upper extremity and left shoulder injuries is related to her October 12, 2001, accident at Lee.

At this juncture of the proceedings, and based on the evidence contained in the record to date, the Board finds that claimant's work activities while employed by O'Reilly have not permanently aggravated or worsened claimant's left upper extremity and left shoulder injuries. Thus, the ALJ's preliminary hearing Order is affirmed.

WHEREFORE, the Board affirms ALJ John D. Clark's August 20, 2002, preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of January 2003

BOARD MEMBER

⁴ See K.S.A. 44-534a(a)(2).

- c: W. Walter Craig, Attorney for Claimant
 Kurt Ratzlaff, Attorney for O'Reilly Automotive, Inc. and Zurich North America
 P. Kelly Donley, Attorney for O'Reilly and RSKo
 Terry J. Torline, Attorney for Lee Aerospace, Inc. and Royal SunAlliance Insurance
 Co.
 John D. Clark, Administrative Law Judge
 Director, Division of Workers Compensation